40. In applying the four-prong public interest test, we find that the merger will violate the cable horizontal ownership statute and rules, which establish limits on a cable operator's size in order to prevent it from threatening diversity and competition in the provision of video programming.[141] Accordingly, as a condition to our grant of the Application, we will require the Applicants, within 12 months from the effective date of the horizontal ownership rules, May 19, 2000, to (a) divest their interests in TWE, (b) terminate their involvement in TWE's video programming activities (pursuant to the limited partnership exemption and the officers/directors attribution waiver provisions of the cable ownership attribution rules), or (c) divest their interests in other cable systems, such that they will have attributable ownership interests in cable systems serving no more than 30% of MVPD subscribers nationwide. We find that this divestiture requirement, together with other interim conditions and enforcement mechanisms discussed below, will mitigate sufficiently the merger's potential to frustrate or impair the Commission's implementation or enforcement of the Communications Act and its objectives.

a. The Merged Firm's Cable Ownership Interests

41. As a preliminary matter, we must determine the extent of the merged firm's cable ownership interests. In the horizontal ownership limits statute, Congress directed the Commission to establish limits on the number of cable subscribers "a person is authorized to reach through cable systems owned by such person, ***or*** in which such person has ***an attributable interest*** . . .."[142] Our cable ownership attribution rules define what constitutes an "attributable" interest such that the holder of the interest should be subject to the horizontal ownership limit:[143]

> The attribution rules seek to identify those corporate, financial, partnership, ownership and other business relationships that confer on their holders a degree of ownership or other economic interest, or influence or control over an entity engaged in the provision of communications services such that the holders should be subject to the Commission's regulation.[144]

42. Under the Commission's cable ownership attribution rules, the merged entity will have attributable ownership interests in cable systems serving approximately 41.8% of MVPD subscribers

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to unaffiliated programming networks such as Fox News, TV Land, and the Game Show Network because they have exclusive contracts with cable operators. BellSouth Comments at 6-8. Seren, a cable overbuilder, states that it has been placed at a competitive disadvantage because AT&T's size has caused the Midwest Sports Channel ("MSC"), which carries a 24-hour regional Minnesota sports channel, to enter into an exclusive contract with AT&T. See Testimony of Peter M. Glass, Vice President and General Counsel, Seren Innovations, Inc., FCC Cable Services Bureau AT&T-MediaOne Public Forum (Feb. 4, 2000), Tr. at 131 (hereinafter "Glass Public Forum Testimony"). WCA argues that the cable operators' purchasing power caused Rupert Murdoch to divest his interest in Echostar, a satellite MVPD, after cable operators refused to carry Murdoch's various Fox networks. WCA Comments at 10.

[141] Communications Act, § 613(f)(1)(A); 47 U.S.C. § 533(f)(1)(A); 47 C.F.R. § 76.504.; *see In re Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits*, MM Docket No. 92-264, Third Report and Order ("*Horizontal Third Report and Order*"), 14 FCC Rcd 19098, 19102 ¶ 29 n.21 (1999).

[142] Communications Act, § 613(f)(1)(A); 47 U.S.C. § 533(f)(1)(A) (emphasis added).

[143] *See Attribution Order*, 14 FCC Rcd at 19016 ¶ 1.

[144] *Id.*, 14 FCC Rcd at 19017 ¶ 2.

nationwide. Approximately 15.3% of the merged entity's subscribership base will derive from its attributable interest in TWE.[145] TWE will be attributable to the merged firm in two ways. First, under our attribution rules, a company that appoints a director or officer to a company or partnership, or shares common directors or officers, is deemed to have an attributable interest in that entity.[146] This rule is based on the economic reality that a director or officer has the power to direct the operations of the entity.[147] Accordingly, if the merged firm appoints directors to the TWE board of directors or management committee, or shares common directors and officers with TWE, then TWE is attributable to the merged firm.

43. Second, our cable ownership attribution rules provide that all partnership interests are attributable because, unlike a corporate shareholder, a limited partner may influence or control the operations of the partnership even if its percentage equity interest is very small.[148] In this case, the merged entity's 25.5% partnership interest representing an investment estimated to be worth some $14 to $18 billion in TWE clearly give it an attributable interest.[149] The consent of the merged entity will be required for many major decisions of the TWE partnership.[150] AT&T has emphasized that its partnership interest and multi-billion dollar investment in TWE will create "an aligning of interests" between AT&T and TWE that will facilitate AT&T's provision of local telephony service over the TWE cable systems.[151] Nothing in the record suggests that this alignment of AT&T and TWE's economic interests will not extend to coordination in the video programming arena.[152] However, as discussed below, the cable

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[145] TWE owns systems that serve 10,856,000 subscribers and operates TWI Cable (a subsidiary of Time Warner Inc.), which owns cable systems that serve 1,795,000 subscribers, for a total of 12,651,000 subscribers. TWI Cable subscribers are attributable to TWE because TWE has operational control over TWI Cable's systems. *See* 47 C.F.R. § 76.503 n.2; 47 C.F.R. § 76.501 n.1.

[146] 47 C.F.R. § 76.503 n.2(c).

[147] 47 C.F.R. § 76.503 n.2(c); 47 C.F.R. § 76.501 n.2(g); *Attribution Order*, 14 FCC Rcd at 19041 ¶¶ 66-68.

[148] *See Attribution Order*, 14 FCC Rcd at 19039 ¶ 61.

[149] *See* Richard Bilotti, Gary Lieberman, Benjamin Swinburne, *4Q99 Review and 1Q00 Preview: Broadband Big Bang*, Morgan Stanley Dean Witter, Jan. 5, 2000, at 93 (MediaOne Group Estimated 2000 Fair Market Value – $13,869,700,000 interest in TWE).; Chistopher Dixon and Catherine Kim, *AOL Time Warner*, Paine Webber Equity Research, Mar. 1, 2000.

[150] *See* AT&T Nov. 24 Ownership Filing at 2 n.7 (TWE matters requiring Applicants' consent include: "the merger of TWE; sale or transfer of assets constituting more than 10% of the TWE assets; expansion of TWE into new lines of business; specified issuances of additional partnerhsip interests; indemnification of any partner or affiliate for liability in excess of $500,000,000; incurrance of debt for money borrowed above a defined ratio; admission of a new general partner; extension of the corporate services term beyond that contemplated in the LPA; certain acquisitions above the greater of $750 million or 10% of TWE's consolidated revenues for its most recent fiscal year; cash distributions above the level provided for in the LPA; dissolution of TWE; voluntary bankruptcy of TWE; amendment or modification of the LPA; and transfer or sale of certain major interests in TWE or any sub-partnership thereof. Mechanically, these rights are exercised by MediaOne through MediaOne's representatives on the TWE Board.").

[151] Testimony of James W. Cicconi, General Counsel and Executive Vice President Law and Government Affairs, AT&T, FCC Cable Services Bureau AT&T-MediaOne Public Forum (Feb. 4, 2000), Tr. at 72-73 (hereinafter "Cicconi Public Forum Testimony"); Applicants Ownership Reply Comments (Dec. 21, 1999) at 18, 24, 30.

[152] *See* Testimony of Greg Simon, Co-Director, openNET Coalition, FCC Cable Services Bureau AT&T-MediaOne Public Forum (Feb. 4, 2000), Tr. at 89-90 (hereinafter "Simon Public Forum Testimony") ("[AT&T stated that] because of [AT&T's and Time Warner Inc.'s] joint ownership of TWE through [AT&T's interest in] MediaOne, ...

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ownership attribution rules permit AT&T to maintain its partnership interest in TWE and to appoint or share common directors and officers without attribution of ownership, if AT&T has no involvement in the partnership's video programming activities.[153]

(i) Waiver of Attribution of Directors and Officers

44. As discussed above, any directors or officers (or the equivalent thereof) that the merged entity appoints to a TWE board or management committee renders TWE attributable to the merged firm.[154] In addition, if the merged firm and TWE share any common directors and officers, then TWE is attributable to the merged firm.[155] In order to avoid this attribution rule, the Applicants may request that the Commission waive attribution for any TWE director or officer, if his or her duties and responsibilities are wholly unrelated to TWE's video programming activities.[156] In addition, if the merged entity and TWE share common directors and officers, the Applicants may seek a waiver from attribution for those directors and officers if their responsibilities are wholly unrelated to both AT&T's and TWE's video programming activities.[157]

(ii) The Insulated Limited Partnership Exemption

45. The Applicants may render their partnership interest nonattributable as follows: Under the insulated limited partnership ("ILP") exemption, a limited partnership interest shall not be attributed to a partner that "is not materially involved, directly or indirectly, in the management or operation of the video-programming related activities of the partnership and the relevant entity so certifies."[158] In order to satisfy this standard, the limited partner may not engage in the following seven activities (the "ILP test"):

(1) The limited partner cannot act as an employee of the partnership if his or her functions, directly or indirectly, relate to the video programming enterprises of the company;
(2) the limited partner may not serve, in any material capacity, as an independent contractor or agent with respect to the partnership's video programming enterprises;
(3) the limited partner may not communicate with the licensee or general partners on matters pertaining to the day-to-day operations of its video programming business;
(4) the rights of the limited partner to vote on the admission of additional general partners must be subject to the power of the general partner to veto any such admissions;
(5) the limited partner may not vote to remove a general partner except where the general partner is subject to bankruptcy proceedings, is adjudicated incompetent by a court of competent jurisdiction, or is removed for cause as determined by a neutral arbiter;

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[AT&T and Time Warner] would be able to align their interests with regard to rolling out local telephony. And, yet, all of a sudden we're asked to believe that they won't align their interests when it comes to programming and video services. One could ask why do you spend so much money to buy companies you then say you have no influence over and you're not going to have any cooperation with.").

153 *See* 47 C.F.R. § 76.503 n.2(b)&(c).

154 *See* 47 C.F.R. § 76.503 n.2(c).

155 *See id.*

156 *See id.*

157 *See id.*

158 *See Attribution Order*, 14 FCC Rcd at 19040 ¶ 64; 47 C.F.R. § 76.503 n.2(b)(1).

(6) the limited partner may not perform any services for the partnership materially relating to its video programming activities, except that a limited partner may make loans to or act as a surety for the business; and

(7) the limited partner may not become actively involved in the management or operation of the video programming businesses of the partnership.[159]

To take advantage of the ILP exemption, the limited partner must file with the Commission a certification, with supporting facts, stating that it is not involved in these seven activities.[160]

46. The cable ownership attribution rules preclude insulation where a limited partner sells video programming to the partnership, based on the recognition that such sales relationships provide the limited partner added capability and incentive to influence the partnership's video programming choices. This preclusion was in effect at the time the proposed merger was announced and remains in effect today. The attribution rules adopted in 1993 permitted insulation where the limited partner did not provide "services for the partnership materially relating to its *media activities*."[161] The rules specifically stated the criteria for insulation under this standard:

> The criteria which would assure adequate insulation for purposes of this certification are described in the Memorandum and Order in MM Docket No. 83-46, FCC 85-252 (released June 24, 1985) ["*1984 Attribution Order on Reconsideration*"] as modified on reconsideration in the Memorandum Opinion and Order in MM Docket No. 83-46, FCC 86-410 (released November 28, 1986) ["*1984 Attribution Order on Further Reconsideration*"].[162]

47. The *1984 Attribution Order on Reconsideration* explains that an insulated limited partner may not perform any services that materially relate to a cable operator's media activities.[163] Again in the *1984 Attribution Order on Further Reconsideration*, the Commission stated that "an exempt limited partner should not perform any services to the limited partnership relating, in any material respect, to its media activities."[164] Given that a cable operator's core media activity is the provision of video programming, there can be no service more material to a cable operator's video programming than the sale of programming to the cable operator. Because video programming is at the heart of "media activities," the Commission in 1989 held that an investor could not shield its investment from attribution

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[159] *See* 47 C.F.R. § 76.503 n.2(b)(2); *Attribution Order*, 14 FCC Rcd at 19040-19041 ¶ 64.

[160] *See* 47 C.F.R. § 76.503 n.2(b)(2) ("[T]he certification must be accompanied by facts, e.g. in the form of documents, affidavits or declarations, that demonstrate that these insulation criteria are met."); *Attribution Order*, 14 FCC Rcd at 19040-19041 ¶ 64.

[161] *See Attribution Order*, 14 FCC Rcd at 19038 ¶ 57 (emphasis added).

[162] 47 C.F.R. § 76.501 n.2(g)(2).

[163] *In re Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities*, MM Docket No. 83-46, Memorandum Opinion and Order ("*1984 Attribution Order on Reconsideration*"), 58 R.R. 604, 607 ¶ 50 (1985) ("[T]he limited partnership agreement should also bar the exempt limited partner from performing any services to the limited partnership materially relating to its media activities.").

[164] *In re Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities*, MM Docket No. 83-46, Memorandum Opinion and Order ("*1984 Attribution Order on Further Reconsideration*"), 1 FCC Rcd 802 ¶ 3 (1986).

if it sold video programming to the investment.[165] Last year, the Commission noted that the sale of video programming was a service materially relating to media activities under the parallel broadcast attribution rule.[166]

48. In the 1999 *Attribution Order*, we replaced the term "media activities" with the term "video-programming related activities" and required the limited partner to certify that it does not provide any service materially related to the partnership's video-programming activities.[167] We amended the rule in order to allow a limited partner to insulate its partnership interest even if it participates in the partnership's other media activities, including the provision of telephony services, so long as it is not materially involved in the partnership's video-programming related activities.[168] We emphasized that our amendment to the ILP rule would not permit a limited partner to insulate itself if it provided services materially related to the limited partnership's video programming activities.[169] Therefore, the new rule maintains the 1993 rule's prohibition against the insulated limited partner's sale of video programming to the partnership.

49. As discussed above in Section III, AT&T and MediaOne hold attributable interests in numerous programming affiliates, including among others, Encore, Bravo, Discovery, New England Sports, BET, American Movie Classics, and STARZ! These affiliates in turn sell their programming to TWE.[170] The Applicants' sale of programming, via its attributable programming affiliates, to TWE is a service for TWE "materially relating to its video programming activities" and provide the Applicants with the added capability and incentive to influence TWE's video programming choices.[171] Accordingly, the merged firm will be deemed materially involved in TWE's video-programming activities, precluding application of the insulated limited partnership exemption. The merged firm thus will have attributable ownership interests in cable systems serving approximately 41.8% of MVPD subscribers nationwide.

b. The Merged Firm's Video Programming Purchasing Power

50. Having determined the merged firm's ownership interests and subscribership base, we next consider how this subscribership base translates into the ability to affect competition and diversity

[165] *See Twentieth Century Corp.*, BTCCT-990617KE, BRCT-88120KM, 4 FCC Rcd 4052, 4054 ¶¶ 15-17 (1989) (although an investor can shield its investment from attribution if the investment is placed in a trust, the investment is not shielded if the investor sells video programming to the investment).

[166] *See Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Regulation and Policies Affecting Investment in the Broadcast Industry and Reexamination of the Commission's Cross-Interest Policy,* MM Docket Nos. 94-150, 92-51 and 87-154, Report and Order ("*Broadcast Attribution Report and Order*"), 14 FCC Rcd 12559, 12617 ¶ 133 (1999) ("[A] contractual arrangement to provide programming would be inconsistent with the insulation criterion that 'the limited partner may not perform services for the partnership materially relating to its media activities.'").

[167] *See Attribution Order*, 14 FCC Rcd at 19040 ¶ 64; 47 C.F.R. § 76.503 n.2(b)(1).

[168] *See Attribution Order*, 14 FCC Rcd at 19040 ¶ 63.

[169] *Id.*

[170] For example, the following AT&T and MediaOne affiliates sell their programming to TWE New York City cable systems: Discovery, USA Network, E! Entertainment, Fox Sports New York, MSG, MSG 2, BET Network, BET on Jazz, Sci-Fi Channel, Bravo, Starz!, the Travel Channel, Animal Planet, QVC, and Court TV. *See* U S West Dec. 14 Reply Comments at 11, Attachment (attaching the channel lineups for TWE New York cable systems).

[171] *See* 47 C.F.R. § 76.503 n.2(b)(2); *Attribution Order*, 14 FCC Rcd at 19040-19041 ¶ 64;

in the delivery of video programming to consumers. As discussed above, MVPDs purchase video programming and deliver it on their distribution networks (*e.g.*, cable or DBS) to their subscribers. Each MVPD negotiates license fees with programming networks for the right to carry the networks on the MVPD's distribution systems. The license fees are based, in part, on the MVPD's total subscriber numbers. In addition, the network often grants the MVPD a portion of the network's advertising time, which the MVPD in turn sells to its own advertisers for advertising revenue. Large MVPDs, such as AT&T, MediaOne, and TWE, are likely to purchase programming networks for delivery to their entire nationwide subscribership. Programmers attempt to reach subscribers on a regional or national basis to increase the value of their programming to advertisers.

51. Start-up video programmers need to reach a critical level of subscribership quickly in order to achieve long-term financial viability.[172] Video programmers' need for a large number of subscribers confers on AT&T, MediaOne, and TWE, which have access to a large number of subscribers, significant bargaining power.[173] Because cable operators purchase programming based on the number of subscribers they serve, we found in the *Horizontal Third Report and Order* that the number of subscribers served by a cable operator most accurately reflects that cable operator's purchasing market power.[174] The Commission also recognized that measuring the market in terms of cable subscribers alone is inappropriate.[175] DBS operators and other MVPDs purchase video programming for their subscribers from the same market and thus directly affect a cable operator's market power. Consequently, a cable operator's purchasing power should be measured in terms of the percentage of all MVPD subscribers that it serves.[176] Under this MVPD subscriber standard, which we use in our cable horizontal ownership rules and in our analysis below, the merged firm would have attributable ownership interests in cable systems serving approximately 34.4 million, or 41.8%, of the nation's 82.36 million MVPD subscribers.[177]

c. Potential Harm to Competition and Diversity in Video Programming

52. In Section 613(f)(1)(A) of the Communications Act, Congress directed the Commission to establish limits on a cable operator's size, because Congress was concerned that concentration in cable system ownership might harm competition and diversity in video programming.[178] Pursuant to this

[172] *1999 Competition Report*, 15 FCC Rcd at 1056 ¶ 177.

[173] *See id.* In addition, the merged entity may coordinate its purchasing decisions with other MVPDs, which would further expand the merged entity's bargaining power and ability to prevent the launch of a new programmer that AT&T, MediaOne, and TWE disfavor. *See id.* at ¶ 168. Concentration of ownership among buyers is one indicator that coordinated behavior among buyers will be successful. *Id.* The seven largest cable operators now serve almost 90% of the nation's cable subscribers, and the ten largest MVPDs serve almost 75% of the nation's MVPD subscribers. *Id.* at ¶ 16, Tbl. C-4.

[174] *See Horizontal Third Report and Order*, 14 FCC Rcd at 19108 ¶ 22.

[175] *See id.* at ¶¶ 27-31.

[176] *See id.* at ¶ 30.

[177] *See* Sections III.A and III.B, *supra*.

[178] *See* Communications Act, § 613(f)(1)(A); 47 U.S.C. § 533(f)(1)(A). *See also* 1992 Cable Act, § 2(a)(4); Pub. L. No. 102-385; 47 U.S.C. § 521 note ("The cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers."); *Horizontal Third Report and Order*, 14 FCC Rcd at 19102-19104, 19113-19114, 19116 ¶¶ 9-14, 38-39, 43; *Report of the Senate Committee on Commerce, Science and Transportation*, S. Rep. 92, 102d Cong., 1st Sess. 34 (1991) ("[L]arge MSOs [cable operators] have the market power to determine what programming
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statutory directive, the Commission enacted the cable horizontal ownership rules, which provide that no cable operator may serve more than 30% of MVPD subscribers nationwide.[179] The Commission voluntarily stayed the horizontal ownership rules pending the United States Court of Appeals for the District of Columbia Circuit's ("D.C. Circuit") consideration of a constitutional challenge to Section 613(f)(1)(A).[180] The D.C. Circuit upheld the constitutionality of the statute on May 19, 2000, on which date the Commission's voluntary stay was automatically lifted and the horizontal ownership rules became immediately effective.[181] In the *Reconsideration of the Horizontal Third Report and Order*, we stated that parties in violation of the rules on the date of the court's decision must come into compliance with the rules within 180 days thereafter.[182] The merged entity's attributable ownership interest in cable systems serving 41.8% of the nation's MVPD subscribers clearly would violate the 30% horizontal ownership limit. We discuss below our horizontal ownership rules and their application to the merged entity.

53. Section 613(f)(2)(A) directs the Commission to set a horizontal ownership limit which would ensure that

> [N]o cable operator or <u>group of cable operators</u> can unfairly impede, either because of the size of any individual operator or because of joint actions by <u>a group of operators</u> of sufficient size, the flow of video programming from the video programmer to the consumer. . .[183]

54. Pursuant to this directive, we found in the *Horizontal Third Report and Order* that, if a cable operator, by itself or in concert with others, can determine the success or failure of a new programming service, then we must conclude that it has excessive purchasing power in the video programming market.[184]

55. As noted above, programming networks generally need to reach a large number of subscribers fairly quickly in order to achieve long term financial viability. In the *Horizontal Third Report and Order*, we found that 15 million subscribers, or close to 20% of MVPD subscribers nationwide, is the minimum number necessary to give a video programmer a reasonable chance of long-term success. In setting the horizontal limit, we also analyzed the new programmer's probable rate of success in reaching subscribers through MVPDs that do not flatly deny it carriage. We found that, on average, a new video programming network is likely to capture approximately 50% of the subscribers that are available to it.[185] Accordingly, we concluded that approximately 40% of the market needs to be available to a new video programming network to give it a reasonable chance of reaching the 15 million

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services can 'make it' on cable.").

[179] 47 C.F.R. § 76.503.

[180] *See In re Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits*, MM Docket No. 92-264, Order on Reconsideration of the Third Report and Order ("*Reconsideration of the Horizontal Third Report and Order*"), 15 FCC Rcd 1167, 1168 ¶ 6 (2000).

[181] *See id.*, 15 FCC Rcd at 1169 ¶ 8.

[182] *See id.*

[183] *See* Communications Act, § 613(f)(2)(A), 47 U.S.C. § 533(f)(2)(A) (emphasis added).

[184] *See Horizontal Third Report and Order*, 14 FCC Rcd at 19114-19116 ¶¶ 39-43.

[185] *See id.*, 14 FCC Rcd at 19117-19118 ¶¶ 48-49.

subscribers (or 20% of the market) it needs for long-term success. To ensure that, even if two cable operators collectively deny carriage to a new programmer, at least 40% of MVPD subscribers nationwide would still remain available to the programmer, we determined in the *Horizontal Third Report and Order* that a 30% horizontal limit was appropriate.[186]

56. We note that some commenters argue that the Commission should use its public interest authority to require the Applicants to divest TWE instead of permitting the Applicants to choose alternative methods to comply with the horizontal rules.[187] MAP argues that the merger of "interests in the first, second, and fourth largest cable MSOs, and in many of the most popular cable program services, substantially threatens the viability of emerging cable programmers."[188] In enacting the Section 613(f)(2)(A) directive for the Commission to adopt a horizontal limit that would protect against the threat that "joint actions by a group of operators" would impede the flow of video programming to the consumer, Congress recognized a significant likelihood that cable operators would coordinate their program purchasing decisions.[189] Because cable operators generally do not compete against each other in their respective franchise areas, they may incur no loss from carrying the same programming networks and have little economic disincentive for coordinated action. There is instead the potential for cable operators to gain by carrying the same programming networks in order to spread the costs of such programming over a larger subscriber base. Coordination in purchasing could increase cable operators' ability to get exclusive contracts with unaffiliated networks, to the detriment of alternative MVPDs (such as DBS) seeking to compete against the incumbent cable operators.

57. The concern about coordinated action reflected in the horizontal ownership rules only becomes stronger in light of recent consolidation in the MVPD industry.[190] In 1999 alone, in addition to the proposed merger between AT&T and MediaOne, other announced mergers and acquisitions include those between Adelphia Communications, Century Communications, and FrontierVision; between Comcast, Jones Intercable, Prime Cable (Maryland), and Lenfest Communications; and between Cox Communications, Media General, Prime Cable (Las Vegas), and TCA Cable. Vulcan Ventures acquired Marcus Cable and Charter Communications (which previously had acquired Falcon) in 1998 and purchased control in numerous MSOs in 1999, including Fanch Communications, Avalon, Greater

[186] *See id.*, 14 FCC Rcd at 19117-19118 ¶¶ 48-54.

[187] *See* Letter from Andrew Jay Schwartzman, President and CEO, Media Access Project, to Magalie Roman Salas, Secretary, FCC, dated May 10, 2000 ("MAP May 10 Letter"); Letter from Andrew Jay Schwartzman, President and CEO, Media Access Project, to Magalie Roman Salas, Secretary, FCC, dated May 31, 2000 at 1 ("[I]t is contrary to the public interest to allow AT&T the option of restructuring its relationship with Liberty Media instead of divesting MediaOne's partnership interest in Time Warner Entertainment, LP.").

[188] MAP May 10 Letter at 4.

[189] *See Horizontal Third Report and Order*, 14 FCC Rcd at 19116 ¶ 43 n.99 (citing 47 U.S.C. § 533(f)(2)(A) (directing the Commission to take into account conduct by a single "cable operator or group of cable operators")); *see also WorldCom-MCI Order*, 13 FCC Rcd at 18025 ¶ 36 ("In our analysis of the competitive effects of the merger, we consider whether the merger will increase the likelihood of unilateral anticompetitive conduct by the merged entity or coordinated anticompetitive conduct of multiple market participants."); *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 19985 ¶ 121 ("Market performance can also be adversely affected if a merger increases the potential for coordinated interaction by firms remaining in the post merger market."); *see also 1992 Horizontal Guidelines*, 57 Fed. Reg. 41552, 41558 § 2.1 ("Lessening of Competition Through Coordinated Interaction").

[190] *See 1999 Competition Report*, 15 FCC Rcd at 986 ¶ 16, 1053 ¶168, 1094 Tbl. C-4 (ten largest MVPDs serve almost 75% of the nation's MVPD subscribers), 15 FCC Rcd at 1053-54 ¶ 168 (noting that MVPDs may coordinate their purchasing decisions).

Media, Helcion, Renaissance, and Rifkin. Concentrated markets are more prone to collusive outcomes than are competitive markets.[191]

58. We agree with commenters that the merged entity presents an especially potent force in the video programming market because AT&T, MediaOne, and TWE are the industry leaders both in their operation of cable systems and their ownership of video programming networks.[192] Beside being the first, second and fourth largest MVPDs nationwide, AT&T, TWE, and MediaOne also have ownership interests in a significant number of video programming networks (including, among others discussed in Section III above, TWE's HBO, Comedy Central, CNN, TNT, Cartoon Network, Cinemax, and the WB broadcast network; Liberty's Encore, Starz!, Discovery Channel, Telemundo Network, BET, USA Networks, and the Learning Channel; Cablevision's Bravo, American Movie Classics, and the Independent Film Channel; and MediaOne's Golf Channel and Speedvision). TWE owns 100% of three of the top six program networks by number of subscribers, and AT&T owns 49% of one of the top six program networks.[193] In addition, AT&T and TWE together own 100% of four of the top six premium networks.[194] Not only will the merged entity have attributable interests in a vast number of programming networks, including many of the networks with the largest number of subscribers nationwide, but new networks will reduce their chances for long-term success if they do not meet the terms and preferences of the merged firm. The combination of these two factors makes the merged entity a potentially powerful gatekeeper that could affect the diversity of video programming delivered to consumers.

59. We believe these potential harms are sufficiently mitigated by compliance with Section 613(f)(1)(A) and the horizontal ownership rules. Accordingly, as a condition to our grant of the Application, we will require the Applicants to (a) divest their interests in TWE, or (b) terminate their involvement in TWE's video programming activities pursuant to the limited partnership exemption and the officers/directors attribution waiver provisions of the cable ownership attribution rules, or (c) divest their interests in other cable systems, such that the merged firm will have attributable ownership interests in cable systems serving no more than 30% of MVPD subscribers nationwide. We discuss below the compliance period, interim conditions, and enforcement mechanisms that we are adopting pursuant to this condition to our grant of the Application.

(i) Applicants' Arguments regarding Lack of Potential Harm

60. The Applicants make four arguments that, they contend, demonstrate that their post-merger size will not threaten competition and diversity in the provision of multichannel video-programming, notwithstanding the findings of the *Horizontal Third Report and Order* supporting our

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[191] *See WorldCom-MCI Order*, 13 FCC Rcd at 18025 ¶ 121 ("As the number of most significant market participants decreases, all other things being equal, the remaining firms are increasingly able to arrive at mutually beneficial market equilibria, to the detriment of consumers. In general, increased concentration facilitates coordinated interaction. . . .").

[192] This analysis does not even take into account the programming interests of Time Warner, Inc. the general partner of TWE. Time Warner, Inc. would also have an incentive to use its relationship with the merged entity through TWE to promote its own programming.

[193] *See* Paul Kagan Assocs., Inc., *Cable Network Television Household Growth*, 1989-1999, Cable Program Investor, Mar. 17, 2000 at 4-5.

[194] *See* Cahners Business Information, *Cablevision- Database: Network Subscribers*, http:// www. cablevisionmag.com/database/db_pay.asp; *see also* Cahners, Network Subscriber Counts, Cablevision Blue Book, Dec. 1999 at 74.

30% horizontal ownership limit. The Applicants do not request a waiver of the horizontal ownership rules based on the particular characteristics of this merger; thus, they are required to abide by the rule. Nonetheless, in the interest of a complete record, we will address the Applicants' four arguments.

61. First, the Applicants argue that increased competition from other MVPDs, particularly DBS, diminishes the Applicants' program purchasing power because video programmers will be able to obtain carriage on other MVPDs.[195] Although we agree that non-cable MVPDs limit the Applicants' market power, we already have considered this factor in our analysis supporting the horizontal ownership rules and found that basing our ownership limit on the number of total MVPD subscribers, rather than cable subscribers alone, adequately accounts for video programmers' ability to obtain carriage from other MVPDs. No merger-specific facts suggest that other MVPDs will have such greater effect on the market behavior of the parties to this transaction that the general rule should not apply.

62. Second, the Applicants argue that the expanded channel capacity of their cable systems will permit them to carry more programmers and therefore diminish their ability to harm programmers.[196] In the *Horizontal Third Report and Order*, we found that this argument had little merit because, among other reasons, the growth rate of new programmers rapidly outpaces the growth of new channels[197] and an increase in sheer number of channels cannot be assumed to indicate an increase in the diversity of channels.

63. Third, the Applicants argue that other Commission rules, such as program access, program carriage, must carry, leased access, and the channel occupancy rules foreclose their ability to exert excessive programming market power.[198] While those rules are important, they are complements rather than substitutes to the horizontal ownership rules. Just as Congress and this Commission found reasonable horizontal limits to be necessary despite the existence of those other rules, those other rules do not eliminate the need to apply the horizontal ownership limit in this case.

64. Fourth, apparently arguing that the merged firm should be able to serve 35% of the nation's MVPD subscribers, the Applicants claim that that the Department of Justice has "effectively established a 'safe harbor' against monopsony power challenges when the [purchaser] firms in question account for less than 35% of total purchases."[199] The Applicants claim that the Department of Justice created this safe harbor by disposing of such matters through what the Applicants contend are "routine Business Review" letters.[200] However, the Department of Justice does not "conduct business reviews for proposed mergers."[201] Rather, the Department of Justice issues business review letters when business entities seek to ascertain the Antitrust Division's enforcement intentions with respect to "potential civil, non-merger, conduct."[202] Moreover, the three business review letters that the Applicants cite involve

[195] Application at 45-54.

[196] *Id.* at 50.

[197] *Horizontal Third Report and Order*, 14 FCC Rcd at 19104 ¶ 14 n.33.

[198] Application at 59.

[199] *Id.* at 56-58.

[200] *Id.*

[201] Department of Justice Antitrust Handbook at III-126 (3d ed. Feb. 1998) ("with the exception of a very limited number of health care mergers").

[202] *Id.* Furthermore, a business review letter would not bind the Department of Justice because the letter states only (continued...)

concerted action by numerous unaffiliated purchasers rather than a single entity or affiliated entities, and thus are factually dissimilar to the proposed merger.[203] In any event, the Department of Justice's business review letters cannot negate the Commission's rules nor our merger analysis, which is guided by different public interest principles.

(ii) Applicants' Waiver Request and the Compliance Conditions

65. The Applicants request that the Commission waive the cable horizontal ownership and ownership attribution rules for 18 months, at the end of which period the Applicants would come into compliance with the rules in effect at that time.[204] The Commission's rules may be waived for good cause shown.[205] A waiver is appropriate only if the applicant shows that (1) special circumstances warrant a deviation from the general rule and (2) a deviation from the rule would better serve the public interest underlying the rule's promulgation.[206] Commission rules are presumed valid, and "an applicant for waiver faces a high hurdle even at the starting gate."[207] For the reasons set forth below, we find that the Applicants have not shown good cause for an 18-month waiver of our ownership rules. Based on the complexity of the business arrangements involved and the many varied interests which the Applicants must divest to ensure compliance, however, we find it appropriate to grant the Applicants a period of 12 months from the effective date of our horizontal ownership rules, May 19, 2000, to effectuate the divestitures required by our current horizontal ownership rules, subject to certain interim conditions and enforcement measures.

66. As the first ground for their waiver request, the Applicants previously argued that the nature of their interests in TWE and programming affiliates such as Liberty and Rainbow does not grant them sufficient control over the day-to-day operations of these entities to implicate the public interest concerns of the cable ownership attribution rules. The Commission has thoroughly considered and rejected these specific arguments in the cable ownership attribution rulemaking proceeding.[208] In that rulemaking proceeding, the Applicants expressly argued that the Commission should apply an "actual control test" and should not deem their interests in Liberty, Rainbow, and TWE to confer influence or control on the Applicants.[209] The Commission rejected these arguments in adopting the revised

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the Antitrust Division's enforcement intentions as of the date of the letter, and the Division may bring at a later date "whatever action or proceeding it subsequently determines is required by the public interest." *Id.* at III-130; *see also United States v. Grinnell Corp.*, 30 F.R.D. 358, 363 (D.R.I. 1962).

[203] *See Business Travel Contractors Corp.*, 1995 DOJBRL LEXIS 9 (1995) (entity to purchase discount airline tickets on behalf of a group of corporations); *IFA Shippers' Ass'n*, 1990 DOJBRL LEXIS 2 (1990) (shippers form group to purchase volume discounts from ocean carriers); *Utilities Service Alliance*, 1996 DOJBRL LEXIS 4 (1996) (electric power utilities form alliance to purchase resources).

[204] Applicants Dec. 21 Ownership Reply Comments at 35.

[205] 47 C.F.R. § 1.3.

[206] *Northeast Cellular Telephone Co., LP v. FCC*, 897 F.2d 1164, 1165 (D.C. Cir. 1990); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956).

[207] *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

[208] *Attribution Order*, 14 FCC Rcd at 19029-19031 ¶¶ 33-37 (rejecting commenters' "day-to-day control" arguments).

[209] *See* Letter from Mark C. Rosenblum, Vice President – Law, AT&T, to William E. Kennard, Chairman, FCC, dated Oct. 1, 1999 at 4 n.4 (incorporating the Applicants Reply Comments from this proceeding into the *Attribution*
(continued...)

ownership attribution rules.[210] A "waiver applicant traditionally has a heavy burden to demonstrate that the arguments advanced in support of the waiver request are substantially different from those that have been carefully considered at the rulemaking stage."[211] The Applicants are merely repeating here the arguments and facts that they presented in the rulemaking proceeding.[212] The Applicants have not shown how a waiver based on these arguments, which were rejected in the *Attribution* rulemaking proceeding, would serve the public interests underlying the ownership attribution rules rather than undermining the integrity of the rules.

67. Second, the Applicants argue that an 18-month waiver of the horizontal ownership and ownership attribution rules would better serve the public interest than strict adherence to the rules because of the public benefits that the Applicants argue the merger will bring.[213] As a preliminary matter, the Applicants have not demonstrated why their claimed local telephony public interest benefits will be obtainable if they have 18 months in which to divest, but not if they have a shorter period for divestiture. More importantly, the waiver standard requires the Applicants to demonstrate that deviation from the cable horizontal ownership and ownership attribution rules would better serve the public interest underlying these rules, and the Applicants have failed to satisfy this burden of proof.[214] The attribution rules are designed to identify investments and other interests that confer on their holders influence or control. The Applicants' claimed local telephony public benefits cannot negate the harm to video programming competition and diversity that would result from the merged entity's influence or control over the nation's first, second, and fourth largest cable operators. Moreover, the Commission considered the Applicants' arguments regarding the benefits of clustering, economies of scale, and competition with LECs when it adopted the cable attribution rules.[215] The Applicants have presented no new arguments in this regard. Accordingly, we cannot grant the Applicants' request that the Commission waive the cable horizontal ownership and ownership attribution rules for 18 months and allow the Applicants to come into compliance with those rules in effect at the end of that period.

68. In June 1998, long before the Applicants' merger negotiations, the Commission had put the industry on notice that parties in violation of the horizontal ownership rules at the time our voluntary

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proceeding); Applicants Sept. 17 Reply Comments at 28-36 (arguing that AT&T's post-merger interests in Liberty, Rainbow, and TWE should not confer influence or control on AT&T).

[210] *See Attribution Order*, 14 FCC Rcd at 19024-19032 ¶¶ 22-39.

[211] *In re Federal-State Board on Universal Service: Startec Global Communications Corp*, CC Docket No. 96-45, Memorandum Opinion & Order ("*Startec*"), FCC 99-75 ¶ 9 n.37 (rel. April 16, 1999) (citing *Industrial Broadcasting Co. v. FCC*, 437 F.2d 680, 683 (D.C. Cir. 1970). *See also Startec*, FCC 99-75 at ¶ 9 n. 38 ("Generally, the Commission need not re-study a matter and reconsider policy every time it receives an application for waiver.") (citing *Wait*, 418 F.2d at 1156-57).

[212] *See Startec*, FCC 99-75 at ¶ 9 (in the rulemaking, the Commission considered and rejected the argument that was the applicant's reason for a waiver).

[213] Applicants Ownership Comments (Dec. 21, 1999) at 35-36.

[214] *See Northeastern Cellular*, 897 F.2d at 1166.

[215] *See Attribution Order*, 14 FCC Rcd at 19026 ¶ 26 ("AT&T, TCI, NCTA and MediaOne argue that the Commission should take into account. . . the benefits of clustering and economies of scale. . . . They argue that the Commission should consider the benefits of enabling cable operators to compete with incumbent local exchange carriers.").

stay is lifted would be required to comply with the rules within sixty days after the lifting of the stay.[216] We specifically warned "particular parties that are now entering into business arrangements that would violate the rules but for the existence of the stay, [that they] should be well aware of the existence of the rules and thus have a full opportunity to comply with them."[217] Thus, at the time of the Applicants' merger negotiations in 1999, the Applicants were on notice that they should not enter into any transaction that would be difficult for them to divest within 60 days after the stay was lifted, and they assumed the risk that they would be forced to divest within 60 days if and when the stay is lifted. In the *Horizontal Third Report and Order* which we adopted in October 1999, three months after the filing of the Application, the Commission decided that 180 days was a more reasonable timeframe for divestitures after the stay was lifted.[218]

69. The Commission has allowed divestiture periods of more than 180 days in similar situations, however, where parties were required to divest properties in order to comply with Commission rules. Indeed, the Commission has granted parties a period of 12 months in order to comply with our ownership rules in a number of instances involving complex business transactions, most recently in granting the license transfer applications attendant to the merger of CBS and Viacom.[219]

70. In this case, all three of the divestiture options available to the Applicants involve complex business transactions. For example, one means for the Applicants to divest their interest in TWE is to activate their registration rights under the TWE Limited Partnership Agreement and sell their interest in a public offering. However, under the terms of the TWE Limited Partnership Agreement, the Applicants cannot start this process until January 2001, and they will have to follow a series of complex procedures (including an assessment by investment bankers) to effectuate a public offering.[220] Alternatively, if the Applicants choose to cease involvement in TWE's video programming activities and make TWE non-attributable pursuant to the insulated limited partnership exemption and directors/officers attribution waiver provisions, among other steps to assure non-involvement, Applicants would have to divest a variety of video programming network ownership interests, including AT&T's attributable interests in Liberty and Rainbow. The Applicants have emphasized, in particular, the

[216] *In re Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits*, MM Docket No. 92-264, Second Memorandum Opinion and Order on Reconsideration ("*Horizontal Second Memorandum Opinion and Order on Reconsideration*"), 13 FCC Rcd 14462, 14492 ¶ 77 (1998).

[217] *Id.*

[218] *See Horizontal Third Report and Order*, 14 FCC Rcd at 19128 ¶ 73.

[219] *See CBS/Viacom Transfer of Control Order*, File No. BTCCT-19991116ABA, *et al.*, FCC 00-155 at ¶¶ 14-16, 18-22 (rel. May 3, 2000) (granting 12-month period to comply with broadcast national ownership and dual network rule); *In re Applications of Turner Broadcasting System, Inc.*, 11 FCC Rcd 19595 ¶ 41 (1996) (granting 12-month waiver to comply with cable-broadcast cross-ownership rule); *Young Broadcasting, Inc*, 11 FCC Rcd. 14632 ¶ 10 (1996) (granting 12-month period to comply with broadcast-cable cross-ownership rule); *In re Applications of Multimedia, Inc.*, 11 FCC Rcd. 4883 ¶ 6 (1995) (granting 12-month waiver period to come into compliance with multiple ownership rules); *In re Applications of Stockholders of CBS, Inc.*, 11 FCC Rcd 3733 ¶ 95 (1995) (granting 12-month period to come into compliance with national radio and television ownership rules).

[220] *See* Time Warner Entertainment Company, LP, Agreement of Limited Partnership, as amended, art. XIII (Sept. 14, 1993); *see also* Letter from Mark Rosenblum, AT&T Vice President – Law, to Magalie Roman Salas, Secretary, FCC, dated May 24, 2000, Transmittal of Letter from Mark Rosenblum to Deborah Lathen, Chief, FCC Cable Services Bureau, dated May 24, 2000, at 2 ("Rosenblum May 24 Letter").

complicated corporate procedures and tax issues involved in the spin-off of Liberty.[221] Finally, if the Applicants choose to retain an attributable interest in TWE and instead divest their ownership interests in other cable systems, they will have to divest from a large number of cable systems, serving approximately 11.8% of MVPD subscribers nationwide, in order to comply with the 30% ownership limit. Consistent with our precedents, we find that the complexity of these transactions supports the granting of a 12-month period for the Applicants to effectuate the necessary divestitures. There is no support in the record, however, for going beyond a 12-month period to give the Applicants 18 months to divest their attributable ownership interests in order to come into compliance with the 30% horizontal ownership limit.

71. Accordingly, as a non-severable condition to our grant of the Application, we will give the Applicants a period of 12 months from the effective date of the horizontal ownership rules, May 19, 2000 to (a) divest their interests in TWE, (b) terminate their involvement in TWE's video programming activities (pursuant to the limited partnership exemption and the officers/directors attribution waiver provisions of the cable ownership attribution rules), or (c) divest their interests in other cable systems, such that they will have attributable ownership interests in cable systems serving no more than 30% of MVPD subscribers nationwide. We also will require the merged firm to file with the Cable Services Bureau, within six months from the closing of the merger, a written document specifying which of the foregoing three compliance options it has elected to pursue. If the merged firm is not in compliance by the May 19, 2001 deadline, then we will require it to place into an irrevocable trust for the purpose of sale the assets that it must divest pursuant to the compliance option that it elected in the foregoing filing to come into compliance with the 30% limit. We also will adopt the Applicants' proposal that, 60 days before the expiration of the 12-month period, May 19, 2001, the Applicants shall file with the Cable Services Bureau a written document (a) stating that it will be in compliance by the May 19, 2001 deadline, or (b) stating that it will not be in compliance and describing the irrevocable trust arrangement that it will establish by the May 19, 2001 deadline for the sale of any assets that it must be divest in order to effectuate the compliance option it had elected.

72. In addition to the above conditions, we will mitigate the potential harm to the diversity of programming and competition during the compliance period by imposing interim conditions on the merged entity. We adopt in this Order the Applicants' proposed interim conditions, subject to certain modifications to fit our divestiture requirements. The interim conditions and their enforcement mechanisms are attached hereto as Appendix B. The Applicants' proposed interim conditions and enforcement mechanisms fall far short of the insulated limited partnership exemption and directors/officers waiver provisions of the cable ownership attribution rules that would establish their non-involvement in TWE's video-programming activities. We deem them sufficient, however, to limit the merged firm's involvement in TWE's video programming activities solely during the period granted by the Commission for compliance with this Order and as a condition for granting the Applicants 12 months from the effective date of our horizontal rules to come into compliance.[222] The merged firm must

[221] Rosenblum May 24 Letter at 3-4.

[222] *See* Letter from Michael Hammer, Esq., Willkie, Farr & Gallagher, to Magalie Roman Salas, Secretary, FCC, dated April 18, 2000, Attachment (Proposed Safeguards Relating to Video Programming) ("AT&T Proposed Video Safeguards"). We believe that extending our six month rule compliance period by an additional six months is a measured and reasoned response to the particular circumstances presented by this case. *See WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972). The *Horizontal Third Report and Order* voluntarily staying the rule pending the Court of Appeals decision found that six months would be a reasonable period to come into compliance for those out of compliance on the date of the decision without any particularized showing. Here applicants will not be out of compliance until the merger closes (which may not occur until a judge

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abide by the interim conditions specified in Appendix B until such time as it has taken the foregoing compliance action.

73. The foregoing conditions will bring the merged firm into compliance with Section 613(f)(1)(A) and our cable horizontal ownership rules, thereby satisfying the first two prongs of our public interest test. Finally, under the third prong of our public interest test, we conclude that the Applicants' compliance with the above divestiture requirements also will ensure that the merger will not frustrate nor impair the Commission's implementation of the Communications Act and its objectives with regard to the promotion of competition and diversity in the provision of video programming.[223]

d. Compliance With the Horizontal Ownership Certification Provision

74. Consumers Union raises two procedural arguments to deny the merger and a collateral, but substantively related, request for forfeiture. First, Consumers Union argues that the Application is procedurally defective and should be dismissed because it does not contain a cable horizontal ownership certification pursuant to Section 76.503(c) of the Commission's rules,[224] which was in effect at the time the Application was filed.[225] The horizontal certification provision in effect at that time required cable

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has found, after a 60 day period for public comment, that DOJ's proposed consent decree requiring AT&T to divest Road Runner is in the public interest (*see* Section IV.C *infra*)). Although the parties can certainly begin the process necessary to come into compliance prior to closing, if they choose to divest TWE, they cannot activate their registration rights under the TWE Limited Partnership Agreement in order to sell their TWE interest in a public offering until January, 2001. In addition, if they choose to divest other cable systems, we believe it reasonable to give them an additional six months to divest cable systems representing approximately 11% of the MVPD market. We believe that a twelve month period for compliance with the horizontal rules from the date the stay was lifted is reasonable under these circumstances, given our further requirements (1) that applicants elect their option for compliance within six months of closing, thus demonstrating significant progress toward the goal, (2) that they make provision for compliance using an irrevocable trust if they are unable to complete the final details of divestiture themselves by May 19, 2001, and (3) that they comply with the interim conditions they have voluntarily proposed that will partially mitigate the harms addressed by the horizontal ownership rule until they obtain full compliance with the rule. We also note that DOJ similarly accommodated contracts governing relations between the parties in its consent decree requiring divestiture of Road Runner. *See United States v. AT&T Corp. and MediaOne Group, Inc.*, Case No. 1:00CV01176, Complaint and Proposed Final Judgment, Competitive Impact Statement at 14 (D.D.C., filed May 25, 2000); *see also* Section IV.C *infra*.

[223] Sections 214(a) and 310(d) of the Communications Act give the Commission independent authority to analyze the potential effect that the merger will have on the delivery of communications services to consumers. The Supreme Court reads the term public interest "broadly, to require consideration of all important consequences including anticompetitive effects." *Denver & Rio Grande Western Railroad v. United States*, 387 U.S. 485, 492 (1967); *see also United States v. FCC*, 652 F.2d 72, 94 (D.C. Cir. 1980) (citing *Denver*, 387 U.S. at 492-494); *Rogers Radio Communications Servs., Inc. v. FCC*, 593 F.2d 1225, 1230 (D.C. Cir. 1978) ("effect on competition [is] clearly a proper factor for the Commission to consider under the public interest, convenience and necessity standard. . . "). For example, in *National Cable Television Association v. FCC*, the D.C. Circuit examined what factors the Commission must weigh when considering whether to permit a telephone company to offer cable services in its telephone service areas as an exception to Commission rules banning cross-ownership of cable companies and telephone companies. *National Cable Television Ass'n v. FCC*, 747 F.2d 1503, 1510 (D.C. Cir. 1984). The court stated that the "FCC might well be required to take [the anticompetitive factors underlying the rules] into account even if it were to abandon entirely the cross-ownership rules." *Id.*

[224] 47 C.F.R. § 76.503(c).

[225] *See* Motion to Dismiss, CS Docket No. 99-251, filed by CU on Aug. 17, 1999 ("Consumers Union Motion to

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operators that reach 20% or more of homes passed nationwide to certify, prior to acquiring additional systems, the percentage change in ownership resulting from such acquisition.[226] Consumers Union argues that the former Section 76.503 required that the horizontal certification be made at the same time that applications for transfers of licenses are filed with the Commission.[227] Second, Consumers Union filed a request with the Commission ("Consumers Union Forfeiture Request") under Section 1.41 of the Commission's rules[228] requesting that the Commission initiate a forfeiture proceeding based on allegations that AT&T has made material misrepresentations to, and failed to be candid with, the Commission regarding AT&T's filing practices under Section 76.503(c), that AT&T has filed its certifications late, and that AT&T has failed to report in its certifications sufficient information for the Commission to assess the impact of the reported transactions.[229] Third, Consumers Union filed a supplemental pleading in this proceeding to argue that the Commission should deny the Application on the grounds that the facts alleged in the Consumers Union Forfeiture Request demonstrate that AT&T does not have the requisite character to hold Commission licenses.[230]

75. AT&T disagrees with Consumers Union's interpretation of the former Section 76.503(c) and argues that this provision required only that AT&T file the certification prior to closing a transaction, not at the time it filed its Application in this proceeding or applications for transfers relating to other transactions.[231] While AT&T admits that some of its Section 76.503(c) letters were filed after transactions had closed, AT&T states that pre-closure filing was not always possible because, in some instances, AT&T and its predecessor TCI were unable to obtain cable homes passed information from the systems they were acquiring prior to closing.[232]

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Dismiss") at 2. Section 76.503 has been amended since the Application was filed. *See Horizontal Third Report and Order*, 14 FCC Rcd at 19134, App. B. Prior to the amendment, Section 76.503(c) provided:

> Prior to acquiring additional cable systems any person or entity holding an attributable interest in cable systems reaching 20 percent, or more, of homes passed nationwide must certify to the Commission that no violation of the national subscriber limits prescribed in this section will occur as a result of such acquisition.

47 C.F.R. § 76.503(c). In light of the stay of enforcement of the horizontal ownership rules, the Commission relieved cable operators of the Section 76.503(c) requirement that the cable operator certify that no violation of the 30% limit will occur as a result of an acquisition, and ordered that the certification should specify only the incremental change the acquisition makes in terms of the 30%. *See Horizontal Second Memorandum Opinion and Order on Reconsideration,* 13 FCC Rcd at 14492 ¶ 76.

[226] *See* former 47 C.F.R. § 76.503(c).

[227] Consumers Union Motion to Dismiss at 1-5.

[228] 47 C.F.R. § 1.41

[229] *See* Complaint Against AT&T Corp. and Tele-Communications, Inc. for Misrepresentation to the Commission, Willful and Repeated Violations of 47 C.F.R. § 76.503(c) and for Lack of Candor, filed by MAP on Oct. 7, 1999 ("Consumers Union Forfeiture Request") at 1-8, attached to Supplement to Petition to Dismiss or Deny, CS Docket No. 99-251, filed by Consumers Union on Oct. 7, 1999 ("CU Supplement").

[230] *See* CU Supplement at 1-8.

[231] Opposition of AT&T Corp. and MediaOne Group, Inc. to Motion to Dismiss, CS Docket No. 99-251, filed on Aug. 23, 1999 ("Applicants Aug. 23 Opposition") at 1-2.

[232] Opposition of AT&T Corp. to Consumers Union Forfeiture Request (incorporated into the record of this proceeding), filed on Oct. 18, 1999, at 4.

76. *Findings*. In the *Horizontal Third Report and Order*, we revised the horizontal certification provision to require information on the number of cable subscribers, a more readily accessible number than cable homes passed, and to clarify that certifications must be filed concurrently with applications for transfers of licenses.[233] This new certification requirement went into effect on February 9, 2000.[234] In the future, applications for transfers of licenses by cable operators serving 20% or more of the MVPD market will be rejected if not accompanied by the new Section 76.503(g) certification. However, former Section 76.503(c) did not specify that certifications be filed concurrently with applications for license transfers. Under these circumstances, and given the extensive homes passed and subscriber information provided in the Application, we find that AT&T's representations to the Commission with regard to its interpretation of the rules and its filing practices do not indicate bad character that would justify denying the Application. Consumers Union's motions to dismiss are therefore denied. However, given that the former rule clearly required that certifications be filed prior to closing, on delegated authority, the Cable Services Bureau granted the Consumers Union Forfeiture Request in part and issued a Notice of Apparent Liability to AT&T for apparent violations of former Section 76.503(c).[235]

2. Program Access Issues

77. The program access rules are designed to prevent vertically integrated programming suppliers from favoring affiliated cable operators over unaffiliated MVPDs in the sale of satellite-delivered programming.[236] Commenters request that the Commission apply the program access rules to AT&T's affiliated programming that is delivered terrestrially and prohibit AT&T from entering into exclusive contracts with unaffiliated networks.[237] Commenters argue that AT&T's increased size will give it the ability to force unaffiliated programmers to enter into low-cost and/or exclusive carriage agreements with AT&T, thereby denying competing MVPDs and their customers access to popular

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[233] *See Horizontal Third Report and Order*, 14 FCC Rcd at 19134 App. B, new Section 76.503(g). Section 76.503(g) provides:

> Prior to acquiring additional multichannel video-programming providers, any cable operator that serves 20% or more of multichannel video-programming subscribers nationwide shall certify to the Commission, concurrent with its applications to the Commission for transfer of licenses at issue in the acquisition, that no violation of the national subscriber limits prescribed in this section will occur as a result of such acquisition.

47 C.F.R. § 76.503(g).

[234] *Horizontal Third Report and Order*, 14 FCC Rcd at 19134 App. B, new Section 76.503(g).

[235] *See In re AT&T Corp.: Apparent Liability for Forfeiture*, NAL/Acct. No. X12000001, Notice of Apparent Liability, DA 00-978 (CSB rel. May 2, 2000) (finding that AT&T had filed certifications late on three separate occasions). Consumers Union also filed a request that the Consumers Union Forfeiture Request be transferred from the Cables Services Bureau to the Enforcement Bureau for consideration. *See* Complaint Against AT&T Corp. and Tele-Communications, Inc. for Misrepresentation and Lack of Candor to the Commission, Willful and Repeated Violations of 47 C.F.R. § 76.503(c) (incorporated into the record of this proceeding), filed by Consumers Union, Consumer Federation of America and Media Access Project on April 14, 2000. In light of the Cable Services Bureau action, we deny this request as moot.

[236] 47 C.F.R. §§ 76.1000-76.1004.

[237] EchoStar Comments at 8-9; WCA Comments at 3; Ameritech Comments at 18-19; BellSouth Comments at 9; Seren Reply Comments at 13-14.

programming.[238] In addition, commenters argue that the merger would increase the possibility that AT&T will migrate affiliated programming from satellite to terrestrial delivery so that it will not be required to give competing MVPDs access to this programming.[239] The commenters argue that AT&T has the ready means to migrate programming to terrestrial delivery because AT&T possesses a coast-to-coast fiber optic network.[240] Commenters add that the merger will increase AT&T's size so that it can cluster more systems, which would further facilitate the terrestrial delivery of programming, especially regional programming.[241] The commenters argue that AT&T's purported ability to lock up unaffiliated programming through exclusive contracts and to shield terrestrially delivered affiliated programming from the program access rules will substantially impair the ability of other MVPDs to compete.[242]

78. Several commenters also request that the Commission reaffirm that Liberty's programming is subject to the program access rules.[243] Ameritech requests that, if AT&T divests its interests in Liberty, Liberty be subject to the program access rules for five years thereafter.[244] In addition, Ameritech requests that the Commission require AT&T to offer affiliated programming to all MVPDs on the same terms, conditions, and prices that the programming is provided to AT&T cable systems and affiliates.[245]

79. *Findings*. The program access rules apply to cable operators and to programming vendors that are affiliated with cable operators and deliver video programming via satellite to a cable operator.[246] The Commission adopted these rules pursuant to Section 628 of the Communications Act,[247] through which Congress sought to minimize the incentive and ability of vertically integrated programming suppliers to favor affiliated cable operators over nonaffiliated cable operators or other MVPDs in the sale of satellite cable and satellite broadcast programming.[248] Among other restrictions, the rules prohibit any cable operator that has an attributable interest[249] in a satellite cable programming vendor from improperly influencing the decisions of the vendor with respect to the sale or delivery,

[238] WCA Comments at 2; EchoStar Comments at 8-9; Ameritech Comments at 18-19; BellSouth Reply Comments at 3; Seren Reply Comments at 1-2. BellSouth states that it does not have access to MSNBC, Fox News, TV Land, and the Game Show Network because they are not affiliated with cable operators but have exclusive contracts with cable operators. BellSouth Comments at 6-8.

[239] WCA Comments at 13-15; Ameritech Comments at 13-16.

[240] WCA Comments at 13; BellSouth Comments at 8-9.

[241] WCA Comments at 15. WCA states that the New England Cable News Network recently migrated from satellite to fiber delivery; Comcast's Philadelphia sports network is delivered by fiber; Cablevision's New York MSG Metro programming is delivered by fiber; and the Tribune Company recently migrated nearly 50 Chicago Cubs games from WGN to the fiber-delivered Chicago-Land Television Network. WCA Comments at 16-17.

[242] *See, e.g.*, BellSouth Comments at 9.

[243] DIRECTV Comments at 4-5; Ameritech Comments at 19.

[244] Ameritech Comments at 19-23.

[245] Ameritech Comments at 18-19.

[246] 47 C.F.R. §§ 76.1000-76.1004.

[247] 47 U.S.C. § 548.

[248] 1992 Cable Act § 2(a)(5).

[249] The attribution of corporate interests for purposes of the program access rules is determined under sections 76.501 and 76.1000(b) of the Commission's rules. *See* 47 C.F.R. §§ 76.501 n.2., 76.1000(b).

including prices, terms, and conditions of sale or delivery, of satellite cable programming or satellite broadcast programming to any unaffiliated MVPD.[250] The rules also prohibit vertically integrated satellite programming distributors from discriminating in the prices or terms and conditions of sale of satellite-delivered programming to cable operators and other MVPDs.[251] In addition, cable operators generally are prohibited from entering into exclusive distribution arrangements with affiliated programming vendors.[252]

80. For the reasons stated in the *Program Access Order*, we decline to apply the program access rules or equivalent restrictions to terrestrially delivered programming distributed by the merged company.[253] We recognize, however, that the integration of MediaOne's cable systems and content with AT&T's coast-to-coast fiber optic network may provide the merged entity with the ability and the cost and quality incentives to migrate video programming from satellite to terrestrial delivery. Such a migration could have a substantial impact on the ability of alternative MVPDs to compete in the marketplace. As we indicated in the *Program Access Order* and the *AT&T-TCI Order*, we remain aware of the potential for this type of migration and the possible need to address it in the future.[254] As we stated in *AT&T-TCI*, if it appears that the movement of programming from satellite to terrestrial delivery is frustrating the pro-competitive purposes of Section 628, we will so notify Congress.

81. We further decline to condition the merger on the imposition of anti-exclusivity restrictions that are not required by the program access rules. If parties believe any existing exclusivity agreements violate the program access rules, the program access complaint process is the appropriate forum in which to resolve any such grievance.[255] Commenters have not alleged that existing exclusivity arrangements are unlawful, and we do not find that this merger provides a basis for the Commission to declare unlawful AT&T's future exclusivity agreements to the extent that they conform to current rules.[256]

82. We also reject Ameritech's proposal that the Commission mandate the sale of AT&T's affiliated programming on certain prices, terms, and conditions. Neither the merger nor the Commission's rules provide any basis for the imposition of a mandate that AT&T price its programming

[250] 47 C.F.R. § 76.1002(a).

[251] 47 C.F.R. § 76.1002(b). This restriction is subject to certain limited exceptions. *Id.*

[252] 47 C.F.R. § 76.1002(c). Relief may be granted pursuant to a Commission determination that specific exclusive arrangements are in the public interest. 47 C.F.R. § 76.1002(c)(4). In addition, exclusive arrangements entered into prior to June 1, 1990, are "grandfathered," or exempt from the exclusivity prohibition, provided they were not extended or renewed after October 5, 1992. 47 C.F.R. § 76.1002(e).

[253] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, CS Docket No. 97-248, Memorandum Opinion and Order and Notice of Proposed Rulemaking ("*Program Access Order*"), 12 FCC Rcd 22840, 22861 ¶ 50 (1997). As we stated in the *Program Access Order*, there are no indications at this time that terrestrial delivery of programming formerly delivered by satellite is a significant competitive problem. However, if, as a trend, vertically integrated programmers began to switch from satellite delivery to terrestrial delivery for the purpose of evading the Commission's rules, we would "consider an appropriate response to ensure continued access to programming." *Id.*

[254] *Program Access Order*, 12 FCC Rcd at 22861-62 ¶¶ 50-51; *AT&T-TCI Order*, 14 FCC Rcd at 3160, 3180 ¶ 37.

[255] 47 C.F.R. § 76.1003.

[256] *See AT&T-TCI Order*, 14 FCC Rcd at 3160, 3180 ¶ 38.

at any particular level, provided the pricing is not unlawfully discriminatory.[257]

83. We reaffirm that the program access rules apply to Liberty by virtue of AT&T's ownership interest in Liberty and its directors on Liberty's board.[258] However, we find no basis in the rules to subject Liberty to the program access rules if AT&T divests its interest in Liberty and Liberty is no longer affiliated with a cable operator. In short, we find that it would be inappropriate to apply to non-vertically integrated cable operators and programming vendors program access rules that were adopted to address anticompetitive harms arising from vertical integration.

3. Channel Occupancy Limits

84. The Commission's channel occupancy rule provides that a cable operator may not devote more than 40% of its activated channels to the carriage of affiliated programming networks.[259] Bell Atlantic argues that, given the number of cable networks in which AT&T and MediaOne have attributable interests, the merged entity will be in violation of this rule.[260] Bell Atlantic requests that the Commission require the Applicants to provide a market-by-market disclosure of their channel line-ups and demonstrate that they will not violate the channel occupancy rule.[261]

85. In response to the Commission's request, the Applicants reviewed the channel line-ups on their systems and determined that the proposed merger would cause channel occupancy rule violations in four systems in Decatur, Illinois; Battle Creek, Minnesota; Minot, North Dakota; and Westport, West Virginia.[262] However, AT&T states that it has adjusted the channel line-ups in all four systems such that there will be no channel occupancy violations when the merger closes.[263] Accordingly, the proposed merger will not result in any violation of the channel occupancy rules.

4. Arguments That the Cable Rules Apply to Internet Access Services

86. Some commenters argue that the merged firm's carriage of Excite@Home and Road Runner will cause it to violate the program carriage and the channel occupancy rules. These rules, however, apply solely to the carriage of video programming.[264] As we found in *IVI*, ISP Internet access services, similar to those services provided by Excite@Home and Road Runner, do not constitute "video programming" as that term is defined in the statute and the Commission's rules and orders.[265] In *IVI*, the

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[257] *See id.*, 14 FCC Rcd at 3180 ¶ 39.

[258] *See also AT&T-TCI Order*, 14 FCC Rcd at 3160, 3179 ¶ 35 n.117 ("AT&T-TCI acknowledge that the merged firm will be subject to the Commission's program access rules.").

[259] *See* 47 C.F.R. § 76.504. This restriction applies only to the first 75 activated channels. *Id.*

[260] Bell Atlantic Comments at 9-12.

[261] Bell Atlantic Comments at 12-14.

[262] *See* Letter from Douglas G. Garrett, Senior Regulatory Counsel, AT&T, to Magalie Roman Salas, Secretary, FCC, dated Mar. 17, 2000, Transmittal of Letter from Douglas G. Garrett, Senior Regulatory Counsel, AT&T, to Deborah Lathen, Chief, FCC Cable Services Bureau, dated Mar. 17, 2000.

[263] *Id.*; Letter from Douglas G. Garrett, Senior Regulatory Counsel, AT&T, to Magalie Roman Salas, Secretary, FCC, dated May 17, 2000, Transmittal of letter from Douglas G. Garrett to Royce Dickens, Cable Services Bureau, dated May 17, 2000.

[264] *See* 47 C.F.R. § 76.504(a) (channel occupancy limits); 47 C.F.R. § 76.1301(c) (program carriage).

[265] *In re Internet Ventures, Inc., Internet On-Ramp, Inc.*, CSR-5407-L, Memorandum Opinion and Order ("*IVI*"), (continued...)

Commission did not decide whether a service that comprises only video programming delivered over the Internet would constitute "video programming" as that term is used in the Commission's rules and the Communications Act.[266] However, Excite@Home and Road Runner are not services comprised only of video programming. Thus, we disagree with commenters' contentions that AT&T and MediaOne are in violation of the program carriage rules by denying carriage to unaffiliated ISPs and by AT&T's decision to limit Internet video-streaming provided by ISPs and carried over its cable systems to ten minutes.[267] For the same reason, we reject Bell Atlantic's argument that the merged firm's provision of Internet services through its affiliates Road Runner and Excite@Home should count towards the channel occupancy limits.[268]

5. Electronic Programming Guides

87. In this section, we examine the proposed merger's potential impact on the use of EPGs. We find that the proposed merger will not violate the Communications Act or any Commission rules as they may pertain to EPGs, nor will it frustrate the implementation of the Communications Act or its goals. Thus, the merger will not result in public interest harms with respect to EPGs.

88. EPGs are on-screen directories of programming delivered through advanced set-top boxes. These programming guides are interactive, with searching and sorting capabilities that take viewers directly to video programming listed on the screen. The purchasers of EPGs are MVPDs such as cable operators and DBS operators, as well as subscribers. Liberty currently owns a 44% share of EPG provider TV Guide, Inc., which in turn owns Prevue Guide, another EPG provider.[269] AT&T has a ten-year contract with TV Guide, Inc. under which TV Guide will provide the exclusive EPG for AT&T

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FCC 00-37 ¶¶ 12-13 (rel. Feb. 18, 2000). In *IVI*, Internet Ventures, an ISP, petitioned the Commission for a declaration that ISPs are entitled to commercial leased access under Section 612 of the Communications Act, 47 U.S.C. § 532. *Id.* at ¶ 1. Section 612 permits unaffiliated video programmers to lease channel capacity on a cable system in order to "originate, produce and provide independent video programming." *Id.* at ¶ 3. The Communications Act defines "video programming" to mean "programming provided by, or generally considered comparable to programming provided by, a television broadcast station," 47 U.S.C. § 522(20), and the leased access statute requires cable operators to reserve channel capacity only for video programming. 47 U.S.C. § 532(a); *see IVI*, FCC 00-37 at ¶ 13. The Commission found that ISPs provide a variety of services that are not video programming – including access to web sites, electronic mail, and video messaging – and accordingly are not entitled to purchase cable channel capacity under the leased access rules for the carriage of such services. *Id.*

[266] *IVI*, FCC 00-37 at ¶ 13. The Commission stated that "regardless of the source of the video content," the provider would be required to comply with all requirements of the rule and statute at issue. *Id.*

[267] *See* Bell Atlantic Comments at 14-16; SBC Comments at 27, 29; AOL Comments at 8-9; SBC Reply Comments at 4. Commenters argue that AT&T's streaming limitation constitutes discriminatory treatment against unaffiliated ISPs.

[268] *See* Bell Atlantic Comments at 9-12.

[269] *See* TV Guide, Inc., Filing S-4/A, dated July 2, 1999 at 6. Gemstar International Group Inc. and TV Guide shareholders have approved a merger between the two entities. *See* TV Guide, Inc., *Gemstar International Group Limited and TV Guide, Inc. Shareholders Approve Merger* (press release), Mar. 17, 2000 ("The transaction will close as soon as it receives regulatory approval . . .."). After the merger, Liberty and News Corp. will each own approximately 19.5% of the equity (for a total of 39% of the equity) of TV Guide International, the new name for the Gemstar/TV Guide merged entity. *See Gemstar International Group Limited, Gemstar & TV Guide Announce Merger Agreement* (press release), Oct. 4, 1999 ("TV Guide shareholders will, in the aggregate, receive approximately 45% of the fully diluted shares of the combined company").

systems.[270]

89. Commenters argue that the proposed merger poses three types of harms with regard to EPGs. First, commenters argue that AT&T will harm unaffiliated video programming networks and interactive service providers (collectively "content providers") by using EPGs to steer subscribers toward affiliated content providers and away from unaffiliated content providers.[271] Second, commenters argue that AT&T will harm unaffiliated EPG providers by selecting AT&T-affiliated EPGs for its cable systems. Third, commenters argue that AT&T will lock EPG providers into exclusive contracts and thereby prevent such EPGs from dealing with other MVPDs.[272] While we find that AT&T's compliance with the video programming conditions discussed above will mitigate the possibility of these three alleged harms, we find also that the record here does not demonstrate that special requirements should be placed on AT&T in this regard. In a rulemaking proceeding of general applicability, the Commission has committed to monitor the EPG market to determine whether Commission action is necessary.

90. We find that our requirement that AT&T reduce its attributable cable system ownership interests will circumscribe AT&T's purported ability to harm unaffiliated content providers,[273] unaffiliated EPGs, and other MVPDs because AT&T, post-divestiture, will serve a smaller share of the MVPD market. The video programming conditions will limit the number of MVPD subscribers for whom AT&T may select an EPG. To the extent that AT&T may steer its own subscribers away from unaffiliated content providers via AT&T's own EPG, we note that the divestiture requirement limits AT&T's size and ensures that other MVPDs will provide sufficient alternative outlets for unaffiliated content providers.

91. With regard to unaffiliated EPG providers who would like access to AT&T's cable systems, the record does not demonstrate that AT&T will exercise undue influence in a purported EPG marketplace by using only one EPG. Because AT&T's horizontal size will be limited as a result of this Order, unaffiliated EPGs will have access to more MVPD subscribers that are not affiliated with AT&T. Moreover, the limited evidence presented in this record appears to demonstrate that even AT&T's own subscribers will have access to alternatives to TV Guide.[274]

92. The record also does not demonstrate that the proposed merger will enable AT&T to prevent EPG providers from serving other MVPDs. TV Guide is free under its ten-year contract with AT&T to offer its EPG to other MVPDs. We find insufficient grounds to conclude that AT&T will lock EPG providers into exclusive contracts.[275]

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[270] TV Guide, Inc., *TV Guide Interactive & TCI Sign Long Term Agreement* (press release), Mar. 8, 1999.

[271] *See, e.g.*, SBC Comments at 37-39; AOL Comments at 10.

[272] *See, e.g.*, Ameritech Comments at 24-26.

[273] EPGs are video programming activities as that term is used in the ILP exemption because they permit a viewer to select video content for viewing. AT&T agreed not to be involved in TWE's EPG use or selection until it has complied with the divestiture requirements of this Order. *See* AT&T Video Safeguard Proposal at 2.

[274] AT&T states that its subscribers will be able to purchase set-top boxes and television sets that contain alternative EPGs. Applicants Sept. 17 Reply Comments at 141 (citing Kathy Haley, *New Directions*, Broadcasting & Cable at 18-36 (Sept. 6, 1999)). We also note that AT&T's cable subscribers may purchase such EPG and video-recording devices as TIVO and Replay and use them as alternatives to AT&T's TV Guide.

[275] *See, e.g.*, Ameritech Comments at 24-26.

93. The commenters have not demonstrated that special requirements should be placed on AT&T alone in its selection and use of EPGs. Under our general rulemaking authority, in order to promote consumer choice, we have committed to "monitor developments with respect to the availability of electronic programming guides to determine whether any action is appropriate in the future."[276] Therefore, to the extent that evidence accrues that demonstrates the necessity of Commission action in the EPG market, we will consider it at that time. We also note that, to the extent that commenters are concerned that cable operators may steer viewers away from broadcast programming via EPGs, we have requested comment in the digital must carry proceeding on "whether any rules are necessary to ensure fair competition between electronic programming guides controlled by cable operators and those that are controlled by broadcasters."[277]

6. MVPD Competition

94. BellSouth argues that the merger will eliminate current and future MVPD competition between AT&T and MediaOne in local areas where the Applicants have overlapping or adjacent cable franchise areas.[278] BellSouth contends that, in the absence of the proposed merger, AT&T and MediaOne would build over ("overbuild") each other's cable systems, thereby offering consumers in those areas two MVPD cable choices.[279] However, we find no evidence in the record to suggest that AT&T and MediaOne would overbuild each other's cable systems such that the proposed merger would diminish competition in these local areas.

95. AT&T and MediaOne own small overbuilt systems in only two areas. First, in 1993, one of AT&T's predecessors acquired a system in Fayetteville, Georgia, which overbuilt in part a system of one of MediaOne's predecessors. As of February 21, 2000, AT&T's and MediaOne's Fayetteville overbuilt systems passed 975 homes in common, and AT&T served 447 subscribers.[280] Second, in 1991, AT&T's predecessor acquired a system in Powder Springs, Georgia, which overbuilt in part a system of one of MediaOne's predecessors. As of February 21, 2000, AT&T's and MediaOne's Powder Springs overbuilt systems passed 1,931 homes in common, and AT&T served 152 subscribers.[281] Since the initial acquisition of the Fayetteville and Powder Springs overbuilt systems, the system owners have not constructed anymore overbuilds, and there is no evidence to suggest that AT&T and MediaOne would overbuild one another absent the merger.[282] AT&T and MediaOne hold overlapping franchise authority in 13 other areas, but have no overbuilds in these areas.[283] There is no evidence that they would

[276] *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Report and Order ("*Navigation Devices Order*"), 13 FCC Rcd 14775, 14820 ¶ 116 (1998).

[277] *In re Carriage of the Transmission of Digital Television Broadcast Stations*, CS Docket No. 98-120, Notice of Proposed Rulemaking, 13 FCC Rcd 15092, 15129 ¶ 82 (1998).

[278] BellSouth Comments at 20-28.

[279] *Id.* at 21.

[280] *See* Letter from Michelle M. Mundt, Esq., Mintz Levin Cohn Ferris Glovsky and Popeo PC, to Magalie Roman Salas, Secretary, FCC, dated Mar. 8, 2000, Transmittal of Letter from Michelle M. Mundt, Esq., to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, dated Mar. 8, 2000, Attachment at 1 ("Mar. 8 Mundt Letter").

[281] *Id.*

[282] *Id.*, Attachment at 1-2.

[283] The overlapping franchise areas are Alaiedon and Woodstock Township, Michigan; Coweta County, Fayette

(continued...)

overbuild each other in these areas absent the merger. We find that the proposed merger is unlikely to diminish MVPD competition between the Applicants to a degree that would warrant the denial of the Application or the imposition of conditions.

B. Cable Equipment

96. In this section, we consider the proposed merger's potential public interest harms with respect to cable equipment. This equipment is the hardware that cable companies use to deliver services to the home. It includes cable modems, cable telephony equipment, and set-top boxes that deliver a range of services to the subscriber. The Bell telephone companies argue that AT&T's size will enable it to favor affiliates to the detriment of unaffiliated cable equipment manufacturers, deny cable competitors access to cable equipment, and exercise excessive market power against equipment manufacturers in general.[284] Commenters also argue that AT&T will be able to dictate set-top box architecture, thereby reducing innovation and consumer choice.[285] These commenters request that the Commission deny the merger or prohibit AT&T from entering into exclusive, proprietary agreements with hardware and software manufacturers of cable equipment.[286]

97. *Findings.* We find that the proposed merger will not result in any violation of the Communications Act or the Commission's rules as they pertain to cable equipment, nor will the merger frustrate the Commission's implementation of statutory goals or policies. The Commission's rules regarding navigation devices,[287] as discussed below, alleviate concerns regarding competition in the production and sale of set-top boxes and modems. We do not find that this merger warrants the imposition of special restrictions on AT&T apart from these rules. As we stated in the *Navigation Devices Order*, we will monitor the market to determine whether the navigation devices rules should be amended to counter future anticompetitive conduct.[288]

98. Section 629 of the Communications Act charged the Commission with ensuring the commercial availability of "navigation devices" – equipment which is used to access video programming and other services provided by MVPDs – to consumers from retailers and manufacturers not affiliated

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County, Fulton County, and Peachtree City, Georgia; Dade County, Florida; Hoffman Estates, Inverness, and Tazewell County, Illinois; and Beaumont, Murrieta, and Riverside County, California. *See* Letter from Michelle M. Mundt, Esq., Mintz Levin Cohn Ferris Glovsky and Popeo PC, to Magalie Roman Salas, Secretary, FCC, dated Feb. 24, 2000, Transmittal of Letter from Michelle M. Mundt, Esq., to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, dated Feb. 24, 2000, Attachment ("Feb. 24 Mundt Letter"). Franchise authorities generally grant cable operators franchises for the entire franchise area, but the franchised cable operator does not always intend to serve the entire franchise area. Thus, although MediaOne and AT&T have overlapping franchise authority in these 13 franchise areas, they are serving separate portions of these areas.

[284] *See, e.g.,* Ameritech Comments at 23 (deny cable competitors access to cable equipment and exercise market power against equipment manufacturers); Bell Atlantic Comments at 52-55 (AT&T could direct affiliate Excite@Home to purchase equipment from affiliate General Instruments, Inc.); SBC Comments at 7-8, 36 (noting AT&T's vertical integration); SBC Reply Comments at 3 (merger would harm equipment market).

[285] *See* SBC Comments at 36; openNET Reply Comments at 14.

[286] *See, e.g.,* Ameritech Comments at 24-26; SBC Reply Comments at 2.

[287] 47 C.F.R. § 76.1200 *et seq.*

[288] *See Navigation Devices Order*, 13 FCC Rcd at 14776 ¶ 2.